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The Honorable Bryan R. White
Thurgood Marshall Federal Judiciary Building
One Columbus Circle NE
Washington, D.C. 20544

Re: Commission on Realignment of Circuits

Dear Justice White:

You told me that if I had any thoughts about the realignment effort to send them along. Perhaps the comments in the attached article would be of interest to the Commission. The short message is that only drastic curtailment of jurisdiction of all inferior federal courts will keep the Courts of Appeals from becoming just another government agency.

I don't mean to impose on you unduly. If the form of this writing is not acceptable for Commission consideration, I will be pleased to amend it. If the form is okay, I will submit it to your reporter.

It was a pleasure to be with you and Marian at the conference in New Orleans. We hope to see you both soon.

Respectfully,



Charles Clark

CC:cb
Enclosure

A DEVELOPING NEW AGENCY: THE FEDERAL BUREAU OF JUSTICE

By Charles Clark*

The future of federal appellate practice is caught between the irresistible force and the immovable object: a limited number of judges deciding an ever-increasing number of appeals. The number of Article III appellate judges cannot continue to increase if circuits are to maintain cohesive precedent. Yet, there seems to be no end of new case filings in the federal court system, and thus no end to increases in the number of appeals filed. The clear consensus is that Congress not only is unwilling to cut federal jurisdiction back to truly federal matters, but is also continuing to add more and more to the existing case load. Even the recent legislation requiring precertification for certain prisoner appeals has resulted in new procedural work for the courts. That work lowers net savings of judge time.

Every judicial system is structured as a pyramid with the court of last resort at the apex. Though the Supreme Court of the United States sits atop the federal pyramid, the Courts of Appeals are effectively the court of last resort in most cases. Those are the courts where the swelling caseload most threatens the ability to do justice.

The following 10 year snapshot of the Fifth Circuit Court of Appeals will illustrate the problem. From 1987 to 1997:

- * Filings increased 70 percent.
- * Terminations increased 65 percent.
- * Authorized judgeships are up 9 percent.

The increase in judges is markedly less than the increase in both filings and terminations. Yet, the judges of Fifth Circuit Court have publicly taken the position that they do not want to add an 18th authorized judgeship, even though the United States Judicial Conference has recommended it. The Court is content to remain at 17 active judges. What's up?

Answer 1: Staff is up:

- * Clerk's office is up 131 percent.
- * Circuit Executive's office is up 248 percent.
- * Library staff is up 107 percent.

Answer 2: Lawyer assistants are up:

- * Staff attorneys' office is up 116 percent.
- * Elbow clerks are up 25 percent.
- * Conference attorneys, 0 to 5.
- * Clerk's office lawyers, 1 to 2.

The total number of lawyers serving in the Fifth Circuit now exceeds 125. The lawyer-judge ratio is almost 8 to 1.

The Staff Attorneys' office initially processes every category of appeal to the Circuit except diversity, bankruptcy, criminal, tax and counsel-briefed Title VII. Five Conference Attorneys work to settle or to shape issues in appeals referred to them by the Court at the beginning of the appellate process. Each of the active judges on the Court has four law

clerks stationed in his or her office. Senior judges have over half that number assigned to their office staffs.

The present statistics on dispositions of appeals show:

- * 5 percent reversed
- * 2 percent remanded
- * 4 percent vacated
- * 89 percent affirmed or dismissed

These numbers reflect an overall decline in the quality of appeals. They also confirm that any party who seeks reversal is swimming against a strong tide.

To help it keep pace with increased filings, the Court has created a Conference Calendar procedure. If you are a *pro se* civil litigant, lawyers in the clerk's office check your appeal for jurisdiction. If it passes, it goes to the Staff Attorneys' office where the director reviews it. He either suggests oral argument and sends it to the calendar pool, or refers it to the regular screening process. A third alternative is to send the case to a member of the judge's staff with directions to read the briefs and record, prepare a memorandum, and compose an opinion. Every other month the record, the briefs and staff counsel's memo and opinion are sent in daily batches of 30 appeals to three judges who assemble in New Orleans for that purpose. Each of the three judges is denominated as initiating judge on 10 of the 30 cases. The judges spend the morning reviewing these appeals. After lunch, the three judges confer and dispose of the 30 appeals. During the four days that the conference

calendar judges meet, they typically dispose of 99 percent of their 120 cases. They either affirm or dismiss the appeals based upon the recommendation of staff counsel, or direct that the case be handled differently. One or two remaining cases will be returned to the docket for further processing. The Fifth Circuit issued 467 conference calendar opinions in 1997. The number is expected to increase in the future.

The Court also disposes of cases through which it calls the "Augean Calendar." Named after the stable for 3,000 oxen Hercules cleaned in one day, it is the product of two lawyers in the clerk's office who present cases with jurisdiction defects and *pro se* mandamus petitions to three judges who are in New Orleans for regular oral argument sessions. The judges meet with the lawyers after regular sessions conclude to approve suggested opinions dismissing these appeals and petitions.

The Conference and Augean Calendars supplement the Court's long-standing Summary Calendar which processes more than 50 percent of all filings by paper circulation, after briefing is complete. This calendar is handled in the separate judges' offices by mail and telephone without argument or an eyeball conference.

These observations are not intended to in any way disparage the Fifth Circuit Judges or the processes they have adopted to meet the rising volume of appeals. Indeed, I feel the work of the Fifth Circuit is the best work done by any Court of Appeals. Its judges work harder at their number one job, teach less, write fewer books and articles and take fewer junkets than most other Article III judges. However, their procedures confirm that, as

filings increase faster than judge power, the appellate judicial work load must shift more and more to recent law school graduates, to staff counsel and to lawyers in the Clerk's office.

A straight line arithmetic projection reveals that, at the present pace, by the year 2020, the third branch will have become what it has fought so long to avoid becoming -- another government agency. Without an increase in judge power or a diminution in filings, staff inevitably will perform more and more of the old line appellate adjudication which laity and the bar still naively believe is accorded to the whole caseload, good, bad and indifferent.

Future appellate lawyers will even more clearly see their practice change from the typical briefing to three judges, with an occasional argument, to bureaucratic decision-making.

Take the following look into your future.

Computers in opposing lawyers' offices will fill out a form much like the one sent recently to the IRS to report your income and compute taxes due. These appeal forms will be sent electronically to the Clerk's computer, which will dismiss the appeal for lack of jurisdiction or route it to the Staff Counsel's Office. A lawyer there reroutes it, along with hundreds of others, to the appropriate port in a computer in three judicial chambers where an untold number of elbow clerks assist each of the 17 real, live judges in maintaining "Computer Judge," a computer programmed to reflect individual judge's judicial philosophy for each of the subject matters dealt with by the court. "Computer Judge" will then deliver an electronic affirmance, perhaps with explanatory notes and opinion, or the case may trigger a switch in the "Computer Judge" which indicates that the case has been chosen as one of a small percent to be fully-briefed and video-conferenced. Oral argument will be reserved for the one or two cases each year deemed to merit en banc review.

Because each of the electronic affirmances will have been randomly routed and the outcome carefully computed based upon the latest update of the judges' philosophy without regard to parties involved in any particular case, you need not worry about inattention or impartiality.

If something doesn't change radically, this new form of bureaucratic decision-making will rule the day. This is less legal science fiction than a real possibility no one wants to concede.

The charge of the present Commission to realign circuits is to seek: (1) timely disposition of appeals, (2) outcomes that are consistent with similar litigation in the same and other circuits, and (3) deliberative attention to each appeal. In testimony before the Commission, judges have conceded filings will continue to grow. The biggest (but not the busiest) circuit wants many more judges. Most say judge power should not increase. Witnesses differ in predicting future consequences, but none foresee that anything like even today's decision-making processes will be adequate. All foresee the continued rapid growth of hired attorney input. Some advocate ending the right to appeal and substituting discretionary review. Others would add another layer of appellate review. One judge advocates two judge panels and specialized courts. A lawyer testified candidly that today's system does not operate as the public perceives it. His remedy is more judges, so more judge time may be devoted to decision-making. Another lawyer advocates that the Judicial Conference begin to exercise its original Congressional mandate to plan the assignment of

active judges to Circuits where statistics show the workload is heaviest. It continues to amaze me that this has never been implemented, even though the federal judiciary keeps the most elaborate statistics imaginable!

A candidate for State Treasurer in Mississippi during the economic hard times which accompanied Reconstruction campaigned on the slogan: "I intend to be as honest as the times will permit."

Perhaps our hope must be that the Federal Bureau of Justice will render prompt opinions that are as just as the times will permit. The crisis is not coming. Its sure causes are in effect now. They grow worse with each passing year in which we do nothing to change their tightening grip. The only viable alternative to bureaucracy is to curtail federal jurisdiction, eliminate some federal causes of action, or both. If you concede that Congress cannot be stopped, appellate practice today will become administrative procedure tomorrow.

* Partner, Watkins & Eager, Jackson, Mississippi. From 1969 to 1992 he served as a member of the United States Court of Appeals for the Fifth Circuit. From 1981 to 1992 he was Chief Judge of the Circuit and from 1989 to 1992 he chaired the executive committee of the Judicial Conference of the United States.

This comment originated in remarks to the Mississippi State Meeting at the 1998 Fifth Circuit Judicial Conference on April 21, 1998. Sources include The Clerk's Annual Report - July 1996 to June 1997; Letter from the Circuit Executive dated April 1, 1998; The Third Branch, March 1998; The Director of the Staff Attorneys' Office of the Fifth Circuit; Testimony before the Commission on Realignment of the Circuits @ APP.COMM.USCOURTS.GOV, and Mules and Wagons - A Plea for Jurisdictional Reform, 14 Miss. Col. L. Rev. 263 (1994).